UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JESUS ALBERTO CABAL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 82-2079 C (6)
	)	
ENVIRODYNE ENGINEERS, INC.	)	
	)	
Defendant.	)	

PLAINTIFF'S POST-TRIAL BRIEF

This matter is presently before this Honorable Court with regard to the portion of Count I of Plaintiff's cause of action pertaining to Defendant's discrimination against Plaintiff on the basis of his national origin. Plaintiff has alleged, and testimony has been adduced that Defendant violated 42 U.S.C. Section 2000(e-2) by and through the manner which Defendant treated Plaintiff. While the issue of national origin discrimination has been briefed by the parties in their pre-trial briefs, this brief summarizes the applicable law, relevant testimony, and documents that were admitted into evidence within the course of the trial of this cause of action.

I. Applicable Law

42 U.S.C. Section 2000(e-2) creates a cause of action for employer discriminatory practices on the basis of national origin. In pertinent part, said section provides as follows:

(a) It shall be an unlawful employment practice for an employer -

> (1) . . . to discriminate against any individual with relation to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. Section 2000(e-5)(f)(1) further provides that if a charge is filed with the Equal Employment Opportunity Commission (hereinafter "EEOC"), and the EEOC dismisses the charge, the complainant has ninety (90) days after the receipt of such EEOC notice of dismissal to bring a civil action against the employer named in the charge.

With regard to Plaintiff's burden of proof, Plaintiff must demonstrate that the Defendant intended to discriminate against Plaintiff on the basis of his national origin. This discrimination can be shown from the "disparate treatment" that Defendant Envirodyne Engineers employed when it treated Plaintiff less favorably than other employees because of Plaintiff's national origin. Clay v. Consumer Programs, Inc., 576 F. Supp.

185 (D.C.Mo. 1983); Bell v. Bolger, 535 F. Supp. 997 (D.C.Mo. 1982).

Further, Defendant is responsible for the acts of discrimination committed by its employees. As the Court stated in Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979), Title VII itself, in 42 U.S.C. Section 2000(e)(b) defines "employer" to include "any agent of such a person". Miller, at 213. Moreover, the Court in Katz v. Dole, 709 F.2d 251 (4th Cir. 1983), stated that "an employer policy or acquiescence in practice" of sexual harassment can constitute a violation of Title VII. When such harassment pervades the workplace, or is condoned or carried out by supervisory personnel, it becomes an illegal and discriminatory condition of employment that poisons the work environment. This rule is likewise applicable to national origin discrimination. Further, the Court in Cariddi v. Kansas City Chiefs' Football Club, Inc. 568 F.2d 87, 88 (8th Cir. 1977) stated that derogatory comments can be so excessive and opprobrious as to constitute an unlawful employment practice under this Title VII.

II. Evidence Offered at Trial

Plaintiff was clearly discriminated against in his employment with Environdyne Engineers, Inc. as a result of his national origin. It is uncontroverted that Plaintiff's work involved, almost exclusively, cyanide testing. While Plaintiff's supervisor initially testified that cyanide was rarely found, he

later admitted that cyanide was found in more than seventy-five percent (75%) of the samples that Plaintiff tested. Plaintiff requested that he perform other analysis yet Defendant refused to allow Plaintiff to perform other work within Defendant's laboratory. This restriction was placed on Plaintiff notwithstanding that he was admittedly hired for numerous kinds of analysis, and that such other analysis was being performed by Americans who were less qualified that Plaintiff.

Other acts of discrimination include Defendant's refusal to allow Plaintiff to improve the safety conditions in the testing of cyanide. Further, it is uncontroverted that Plaintiff's supervisor did not even extend common courtesy to Plaintiff with regard to showing Plaintiff the lunch room and restroom facilities. Further, Plaintiff testified that his supervisor failed to greet him and advise him with regard to the completion of his "time sheets", which were necessary to be completed in the course of Plaintiff's employment with Defendant.

Further, it is uncontroverted that Defendant did not include Plaintiff within the normal day-to-day activities that occurred within Defendant's laboratory. Despite testimony of numerous witnesses that lunch was bought for many employees on an almost day-to-day basis, Plaintiff was not included in those lunches with the exception of four or five times (according to Defendant's testimony) in the course of his employment with Defendant. This is notwithstanding the fact that Defendant's

employees constantly inquired of Plaintiff as to whether he would like to have lunch with them and Plaintiff's response that he would enjoy partaking in lunch with the other employees.

It is further uncontroverted that Plaintiff's supervisor "laid-off" Plaintiff on two occasions. The testimony of Plaintiff, and of Mr. Myers, Plaintiff's supervisor, was that Mr. Myers did not even check the refrigerator or Defendant's other facilities to determine if work was available for Plaintiff. Further, the first lay-off occurred immediately after Plaintiff's finding and reporting to his supervisor of excessively high levels of cyanide; the second lay-off occurred at the same time that Defendant was hiring an employee of American origin for full-time employment to perform duties that Plaintiff was capable of performing.

Further, it is uncontroverted that at the outset of Plaintiff's employment, Plaintiff requested full-time employment from defendant. Mr. Shaaban Ben-Poorat testified that Plaintiff requested full-time employment from Defendant. Further, Mr. Ben-Poorat advised Plaintiff that Plaintiff's position would develop into a full-time position with Defendant in the event Plaintiff's work was satisfactory. The testimony of Mr. Myers was that Plaintiff's work was satisfactory. Further, it is uncontroverted that Plaintiff requested full-time employment with Defendant on numerous occasions during his employment with

Defendant. Yet, Plaintiff's supervisor ignored his requests for full-time employment.

It is further undisputed that one of the two full-time employment jobs that were available during Plaintiff's employment with Defendant was offered and accepted by Ms. Karen Godfrey, an employee of American origin. Mr. Myers testified that Ms. Godfrey was hired over Mr. Cabal due to the fact that she had an additional degree in biology and training in English. Yet, Mr. Myers stated on cross-examination that Ms. Godfrey's duties did not include any biological testing, nor was her English training a consideration with regard to her being hired over Mr. Cabal. Further, it is uncontroverted (Plaintiff's Exhibit 11) that Mr. Myers stated that Plaintiff was overqualified for a full-time technician position that became available during the course of Plaintiff's employment with Defendant. This is despite the fact that the technician job salary was only twenty-five cents (25c) per hour less than that of the professional job that was available and that Mr. Myers knew that Mr. Cabal was of very limited means. Despite the obvious conclusion that Plaintiff's supervisor discriminated against him on the basis of his national origin, Defendant expects this Court to reasonably believe that Defendant was justified in its failure to offer Mr. Cabal full-time employment. <u>This justification is because Plaintiff was over-qualified for the technician job and under-qualified for the professional job</u>!

Further, it is uncontroverted that discussions of Columbians and drugs occurred within Defendant's laboratory. Mr. Ron Swaller testified that while those discussions may have occurred on a regular basis, it was merely only a reflection of the current news topics. Despite the testimony of Mr. Paul Humburg that the name Jesus Alberto Cabal appeared to him to be that of a typical white American male, it is incredulous for Defendant to assert that everyone within Defendant's lab was not aware that the Plaintiff was of Columbian origin. Yet, Defendant, even if it was only discussing current events, constantly and intentionally ignored Plaintiff's rights, and feelings, sterotyped individuals from Columbian origin, and asserted that those individuals were "drug dealers" and "pot dealers".

Further, Plaintiff testified that on numerous occasions Defendant's employees, including supervisory personnel, asserted that Columbians were "gay", "weirdos", and "homosexuals". These statements, in and of themselves, and certainly in conjunction with Defendant's other activities, discriminated against Plaintiff because of his national origin and caused Plaintiff great harm, suffering, and emotional distress. Ultimately, Plaintiff was caused to leave his job and suffer great harm while being unemployed and often starving for food.

Lastly, Plaintiff cites to this Court's jury instructions whereby the Court recognized the difficulty in proving

discrimination. Herein, Plaintiff maintains that the above acts and conduct of Defendant's employees, including Defendant's supervisory personnel, clearly evidences Defendant's discrimination against Plaintiff by virtue of Plaintiff's national origin. However, this discriminatory intent is further demonstrated by the statement of Mr. Humburg to Mr. Myers that he did not like people of Hispanic origin. On page 158 of Mr. Myers' deposition, he stated that Mr. Humburg advised him of this fact at a time much prior to Plaintiff's employment with Envirodyne Engineers. (It should be noted that Mr. Humburg tried to avoid the incriminatory nature of this statement by contradicting Mr. Myers and stating in Court that the statement was made after Plaintiff left Defendant's employ.) Mr. Myers, armed with the knowledge of Mr. Humburg's dislike for people of Hispanic origin, and recognizing that Mr. Humburg was second in command within Defendant's laboratory, nevertheless failed to take any reasonable steps whatsoever to deter the blatant and continuous discrimination that Plaintiff was suffering within Defendant's laboratory.

III. Conclusion

The above facts clearly demonstrate Defendant's discrimination of Plaintiff by virtue of his Columbian national origin. The admission by Plaintiff's supervisor, Mr. Paul Myers, that he knew Mr. Humburg did not like people of Hispanic (Columbian) origin is shocking evidence of Defendant's intent to

discriminate against Plaintiff on the basis of his national origin. This discrimination was pervasive in the workplace and also carried out through Defendant's supervisory personnel. Further, the discrimination by Defendant's employees was further condoned by Defendant's supervisory personnel. Thus, Defendant's practices were illegal and discriminatory conditions of employment and violated 42 U.S.C. Section 2000 (e-2). See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Garber V. Saxon Business Products, Inc. 552 F.2d 1031 (4th Cir. 1977).

Lastly, with regard to the jury findings within the special jury interrogatories, those findings are not res judicata upon this Court within the Title VII action. At most, the jury's answers constitute an advisory opinion for this Court. In this regard, Plaintiff cites Defendant's counsel's objection to the use of these jury interrogatories due to the fact that the Court's reliance upon them would cause the Title VII action to be tried by a jury, when the trial of such cause of action is to be exclusively decided by the Court. Further, the jury was considering Plaintiff's claim of racial discrimination, and its verdict in favor of Defendant denied Plaintiff's claim only in that regard. This should not affect this Court's determination of Plaintiff's national origin claim.

In fact, it is questionable whether the jury fully understood the special jury interrogatories. Initially, on Thursday, May 8, 1986 at approximately 5:20 p.m. the jury

inquired as to answering question #3 in the event their answer to either question #1 or #2 was in the affirmative. At that point, it clearly appeared that the jury found Plaintiff to have been discriminated against in his employment by Environdyne Engineers, Inc. Subsequently, when the jury returned their verdict, the jury found the answers to interrogatories #1 and #2 to be in the negative and further answered questions #3, #4 and #5. These answers by the jury were in direct contradiction to the specific and clear instructions stated by the Court within the jury interrogatories that only required the answering of these questions in the event either questions #1 or #2 were answered by the jury in the affirmative. Thus, this Court should not rely upon the answers provided by the jury in the special jury interrogatories with regard to Plaintiff's claim of national origin discrimination that is pending before this Honorable Court.

In summation, the decision by this Court does not rest on a complicated legal analysis, but rather on a careful and scrutinizing review of the facts. These facts have been briefly reviewed herein. A summary of eight facts clearly indicate the discrimination that Plaintiff incurred and Defendant's attempted "cover-up" of this discrimination. These eight facts are:

1. Plaintiff's supervisor testified in Court that cyanide was rarely found, yet he later admitted in Court that Plaintiff

found cyanide in more than seventy-five percent (75%) of the samples that he tested.

2. Defendant's employees testifying that with the exception of four (4) or five (5) days, they did not buy lunch for Plaintiff even though they bought lunch for the American employees.

3. Plaintiff's supervisor "laying off" Plaintiff without checking the refrigerator or Defendant's other facilities to determine if work was available for Plaintiff.

4. Plaintiff's supervisor stating that Ms. Godfrey was hired because she had a degree in biology, yet further testifying that the position for which Ms. Godfrey was hired did not include biological testing whatsoever.

5. Plaintiff's supervisor stating that Plaintiff was over-qualified for a technician's job and unqualified for a professional job.

6. Mr. Paul Humburg testifying in Court that he believed the name "Jesus Alberto Cabal" to be that of a typical white American male.

7. Mr. Myers stating, (page 158 of his deposition) that prior to Mr. Cabal's employment with Defendant, Mr. Humburg told him that "he did not like people of Hispanic origin.

8. Mr. Humburg stating in Court that he only made the statement about "Hispanic origin" after Mr. Cabal left Defendant.

By virtue of the foregoing, Plaintiff respectfully requests this Court to find that Defendant discriminated against Plaintiff on the basis of his national origin, and that this Court award Plaintiff such actual damage that Plaintiff reasonably incurred as a result of Defendant's discrimination, and that this Court further award Plaintiff punitive damages in order to deter Defendant and others from engaging in similar discriminatory conduct, and that Defendant be assessed the costs and Plaintiff's reasonable attorney's fees incurred herein, and that this Court make other and further relief as it deems just and proper in the premises.

NEWMAN, GOLDFARB, FREYMAN &
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